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No. 86-482

IN THE

Supreme Court of the United States

October Term, 1986

PATCHOGUE NURSING CENTER,

Petitioner,

against

OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services, and DAVID AXELROD, as Commissioner of the New York State Department of Health,

Respondents.

Brief of the New York State Health Facilities Association, Inc. *Amicus Curiae*, in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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November 4, 1986

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STATEMENT OF INTEREST.

This *Amicus Curiae* brief is submitted on behalf of the New York State Health Facilities Association, Inc. ("NYSHFA") in support of the Petition by Patchogue

Nursing Center ("Patchogue") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. All of the parties to this litigation have been advised of NYSHFA's intent to file this Brief and all parties have consented to its submission.

NYSHFA is a not-for-profit corporation whose membership consists of over two hundred long term residential health care providers throughout the State of New York. These institutions render "skilled nursing facility" or "intermediate care facility" services as defined in the federal Medicaid Act (42 USC §1396 *et seq.*) to some 30,000 sick and mostly elderly patients. NYSHFA has a significant and substantial interest in the outcome of the instant litigation because of the broad participation of its membership in the Medicare and Medicaid programs and because of its interest in the due process rights of its membership in connection with limitation or severance of participation in the Medicare or Medicaid programs.

For NYSHFA's purposes, this case involves issues arising under the "intermediate sanctions" provisions of 42 USC §§1395cc(f) (Medicare) and 1396a(i) (Medicaid). Under those provisions, the Secretary of the United States Department of Health and Human Services ("HHS") under Medicare and the New York State Department of Health under Medicaid, may impose intermediate sanctions on residential health care facilities when such facilities fail to comply substantially with the standards for provider participation in the Medicaid and Medicare programs.

Intermediate sanctions prohibit Medicare and Medicaid reimbursement to providers for care rendered to any patients admitted after the date of imposition of the sanc-

tions. Under the above referenced statutes, these sanctions are a remedial and not punitive measure, to be used as an alternative to the program decertification of the provider. House Report No. 96-1167; U.S. Code, Congressional and Administrative News, 96th Congress, 2d Session (1980) Vol. 5 at 5569. The less drastic sanction is permitted to be employed where the deficiencies of the facility do not immediately jeopardize the health and safety of the patients. 42 USC §§1395cc(f)(B) and 1396a(i)(1)(B). On the other hand, decertification is the remedy in the event patient health and safety are jeopardized. 42 USC §§1395cc(f)(A) and 1396a(i)(1)(A).

The impact of intermediate sanctions is disproportionately high in New York State. New York is a heavily urban state with several metropolitan areas containing large concentrations of sick, elderly, and poor patients residing in nursing homes. It is not unusual for residents in facilities in the New York City area to be nearly 100% Medicaid. In upstate New York, residential health care facility Medicaid populations in excess of 50% are common. It is for this reason that a ban on payments to such facilities for new Medicare or Medicaid patients is certain to have catastrophic financial consequences.

The statute provides that no decision by HHS to impose an intermediate sanction may be implemented until after the facility is given a reasonable opportunity to correct the deficiencies and, thereafter, reasonable notice of the claimed deficiencies and an opportunity for a hearing. 42 USC §1395cc(f)(2). The statute also provides that the decision to deny payments may be made only after notice to the public and to the facility as may be prescribed in regulations. 42 USC §1395cc(f)(3). Although no implementing regulations had been promulgated at the time

that the informal hearing procedure was afforded to Patchogue, regulations subsequently have been filed that purport to sanction this informal process. 51 Federal Register, 24, 484, July 3, 1986. For reasons set forth below, NYSHFA contends that these regulations, like the process accorded Patchogue, are unconstitutional.

In 1985, the Office of Health Systems Management (OHSM) within the Respondent New York State Department of Health, determined that Patchogue did not meet two of the 18 conditions of participation in the above-referenced programs as set forth in subpart K of title 42 of the Code of Federal Regulations. 42 CFR §405.1101 *et seq.* As set forth in Patchogue's Petition to this Court, the Secretary accepted DOH's recommendation and determined that Patchogue should be banned from future Medicaid and Medicare payments pursuant to 42 USC §1395cc(f)(1)(B). The Secretary subsequently limited the informal pre-deprivation hearing so as not to allow Patchogue full rights to cross-examine and compel the attendance of witnesses, and restricted the hearing to the receipt of written submissions and oral argument by the facility's counsel.

Patchogue sought, *inter alia,* preliminary injunctive relief from the imposition of the ban, claiming that Congress intended a more extensive pre-ban hearing than was provided and that the pre-deprivation hearing was not sufficiently protective of Patchogue's constitutional due process rights. The Circuit Court of Appeals held that considering the due process requirements for the pre-deprivation hearings set forth by this Court in *Cleveland Board of Education v. Loudermill,* ____ US ____, 105 S. Ct. 1487, and *Matthews v. Eldridge,* 424 US 319, 343, the process accorded was "fully adequate and sufficiently

protects the private interest . . . ." See Appendix to Patchogue Petition, p. 45a.

The above referenced implementing regulations were promulgated by HHS shortly before the Court of Appeals decision. They provide for an informal hearing process for the reason that it would be "unreasonably burdensome" to provide a full evidentiary hearing to facilities subjected to intermediate sanctions, and then provide another full evidentiary hearing if the facility does not correct the deficiencies and is terminated. Federal Register, Vol. 51, No. 128, July 3, 1986 at p. 24488.

SUMMARY OF ARGUMENT.

As emphasized in Patchogue's Petition for Certiorari, in all cases decided by this Court where pre-deprivation process was less than that which is required to meet the requirements of due process, sufficient due process procedures were provided at some reasonable time subsequent to the deprivation. See e.g. *Matthews v. Eldridge,* 424 US 319. This court noted in *Cleveland Board of Education v. Loudermill,* ____ US ____, 105 S. Ct. 1487, that the existence of post-termination procedures is directly relevant to the necessary scope of pre-termination procedures. 105 S. Ct. at 1496, n. 12. NYSHFA agrees with Patchogue that non-evidentiary pre-deprivation procedures are constitutionally insufficient to protect the rights* of facilities subjected to intermediate sanctions.

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*Patchogue is entitled to assert rights under the due process clauses of both the Fifth and Fourteenth Amendments to the U.S. Constitution. The right under the Fourteenth Amendment derives from the State's administration of the Medicaid Program.

ARGUMENT.

The Implementation of Intermediate Sanctions After Informal Pre-Deprivation Procedures Constitutes a Violation of Due Process.

Facilities in the position of Patchogue are required by statute to be given an opportunity to correct deficiencies subsequent to a determination of non-compliance. 42 USC §1395cc(f)(2). Because of the drastic financial consequences of a ban on admissions of Medicaid patients, it is very likely that corrective action in most cases will result in the ban being lifted prior to the final termination of Medicare and Medicaid provider status. Indeed, this is the clear intent of intermediate sanctions, and it therefore is to be expected where such sanctions are imposed that the pre-termination informal hearing is the only process which will be received by the facility.

As noted above, in New York State, the Medicaid census in NYSHFA's membership is sufficiently high that the imposition of intermediate sanctions is virtually certain to have catastrophic economic consequences for a facility, unless the sanctions are expeditiously removed. Moreover, it is clear that these financial consequences involve a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs. See e.g., *Case v. Weinberger,* 523 F2d 602 (2d Cir. 1975), see also *Board of Regents v. Roth,* 408 US 564, 577. It also is settled that the flexible concept of due process involves a balancing of interests which considers the private interest at stake; the risk of erroneous harm to such interests through the procedures used (taking into account possible benefits of alternate procedures); and the governmental interests sought to be furthered, including a consideration

of the burdens imposed by the various procedural options. *Mathews v. Eldridge,* 424 US 319, 334-335, *supra.* The result of these considerations, and the minimum that constitutional due process will tolerate, is a hearing for the provider "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 US 545, 552.

The Circuit Court of Appeals reasoned that less than full evidentiary pre-termination hearing procedures is sufficient to meet this due process standard because it would be anomalous to impose more stringent procedural protections for intermediate sanctions than are accorded facilities whose participation in the Medicare or Medicaid programs is terminated. Similarly, HHS argued in support of the regulatory imprimatur on informal non-evidentiary pre-ban hearings that procedural protections need not rise to the same level as employed for provider termination. Federal Register, Vol. 51, No. 128, July 3, 1986, p. 24488.

However, this rationale ignores the fact that, unlike the termination situation, intermediate sanctions are imposed only where patient welfare is not in immediate danger. Therefore, the delay inherent in a full evidentiary hearing is not a practical problem. This rationale also ignores the fact that in the termination situation, a post-termination full evidentiary hearing eventually is provided. As due process procedures subsequent to intermediate sanctions frequently will be rendered unnecessary by corrective action, full due process is not merely delayed, it is effectively eliminated for most impositions of intermediate sanctions.

Thus, the holding by the Court below that there is no need for pre-deprivation recognition of Patchogue's full due process rights presents an issue of great importance to institutional participants in the Medicare and Medicaid

program, both in New York State and throughout the United States.

A right to a hearing "in a meaningful manner" means that there must be a real opportunity to dispute the existence of the deficiencies, whether by impeachment of the factual bases of the deficiencies or a showing that the surveyors were overly subjective, biased or arbitrary. This opportunity may be provided, in conformity with the balancing approach set out above, by requiring at the mandated hearing the appearance by the surveyors, the *prima facie* demonstration of deficiencies and the confrontation and cross-examination of these persons in a manner allowing a provider to demonstrate that the deficiencies do not exist.

The danger to long term providers from the informal procedure employed below is clear. The very existence of a due process and hearing requirement in §1395cc assumes the fallibility of judgments by the survey team. In many cases, in the absence of confrontation or cross-examination of surveyors, that fallibility would not be the subject of meaningful inquiry and review. Thus, the provider in this case has presented the Court with a factual scenario likely to reoccur. There is substantial injury and a possibility, due to the procedure employed, that a sanction will be imposed upon providers erroneously. See *Mathews v. Eldridge, supra.* For this reason an important national issue regarding the administration of the Medicare and Medicaid programs is presented by the instant case.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted. In addition, because of the significance of this case, the

Court should entertain the views of NYSHFA. Accordingly, NYSHFA should be granted *Amicus Curiae* status and be permitted to file any further brief as warranted by the Grant of Certiorari.

Dated: November 4, 1986.

Respectfully submitted,

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